

**IN THE UNITED STATE DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

MASS ENGINEERED DESIGN, INC.  
and JERRY MOSCOVITCH

Plaintiffs, Counter-defendants,  
Cross-claimants

vs.

ERGOTRON, INC., DELL INC., CDW  
CORPORATION, and  
TECH DATA CORPORATION

Defendants,  
Counterclaimants

and

DELL MARKETING L.P.

Intervenor-Defendant,  
Counterclaimant;

Civil Action No. 2:06 CV-272

Judge Leonard E. Davis

**JURY TRIAL DEMANDED**

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**SUPPLEMENTAL DECLARATION OF LORA MITCHELL FRIEDEMANN IN  
SUPPORT OF ERGOTRON'S MOTION TO COMPEL DISCOVERY AND FOR AN  
ORDER CONCERNING PLAINTIFFS' WAIVER OF THE  
ATTORNEY-CLIENT PRIVILEGE**

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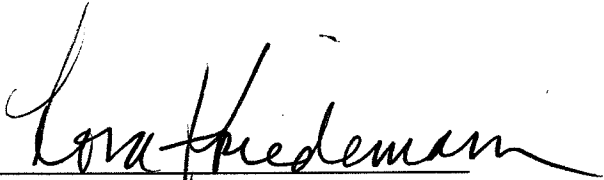
I, Lora Mitchell Friedemann, declare as follows:

1. I am an attorney with Fredrikson & Byron, P.A. and am one of the attorneys representing Ergotron, Inc. in this case. This declaration is submitted in support of Ergotron's request to supplement the record on Ergotron's Motion to Compel Discovery and for an Order Concerning Plaintiffs' Waiver of the Attorney-Client Privilege.

2. Attached as Exhibit 1 is a July 4, 2003 letter from Laura C. Young, Gowling Lafleur Henderson LLP, to Mirek Waraksa. Plaintiffs produced the letter after briefing on the pending motion was complete.
3. After Plaintiffs produced the letter attached as Exhibit 1, Plaintiffs later "snapped back" the letter, claiming it contains privilege information. A copy of the email from Plaintiffs' counsel is attached as Exhibit 2.
4. Plaintiffs subsequently produced a redacted copy of the same letter. A copy of the redacted version of the letter is attached as Exhibit 3.
5. The Protective Order of the Court entered in this case permits a party to retain a complete copy of a document that is "snapped back" for the purpose of challenging the claim of privilege.
6. Attached as Exhibit 4 is a redacted copy of a letter from Mirek Waraksa to Laura Young dated August 12, 2003. Plaintiffs produced the letter after briefing on the pending motion was complete.
7. Attached as Exhibit 5 are excerpts from the Rule 30(b)(6) deposition of Mass Engineered Design, Inc. taken on January 18, 2008 that relate to the issues addressed in the pending motion.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 25, 2008

  
Lora Mitchell Friedemann

4312231\_1.DOC

**Exhibit 1**

**GOWLINGS**

Incorporating the practice of SMITH LYONS

**COPY**

July 4, 2003

Mirek Waraksa  
50 Rosehill Avenue  
Toronto, Ontario  
M4T 1G6

Dear Mr. Waraksa:

**Re: Professional Negligence Action**

We are the solicitors for Jerry Moscovitch, Mass Inc. and C Engineered Design Inc.

I write to put you on notice of a claim by my clients arising out of US patent 5,687,939 for a dual screen display (the '939 Patent). You were retained by the inventor, Mr. Jerry Moscovitch, to seek and obtain patent rights with respect to the invention. In particular, you were instructed to seek the broadest possible patent, including one which covered booking. You were also instructed to file a divisional application for the ball joint aspect set out in the original patent. You agreed to do so and accepted funds for same, however you failed to file the divisional application to protect this independent claim before the '939 Patent issued. Accordingly, Mr. Moscovitch forever lost his rights to pursue a patent for the ball joint invention. Your failure to follow instructions in this regard, and your failure to act diligently and professionally in carrying out your duties has resulted in damages to my client. In particular, competitors have adopted this design and have profited from its use.

As a result of the above-noted negligence, my client has suffered considerable damages. Accordingly, I would suggest that you bring this matter to your insurer(s) attention, and have them contact us in order to obtain particulars with respect to this matter.

I look forward to hearing from your insurer(s) and/or you with respect to this matter.

Suite 4900  
Commerce Court West  
Toronto, Ontario  
Canada M5L 1J3  
Telephone (416) 862-7525  
Facsimile (416) 862-7661  
www.gowlings.com

Laura C. Young  
Direct (416) 862-4412  
Direct Fax (416) 863-3622  
Assistant (416) 862-4611  
laura.young@gowlings.com  
File T939961

M144032

Yours very truly,  
**GOWLING LAFLEUR HENDERSON LLP**

Laura C. Young  
LCY:md

cc: ✓ Jerry Moscovitch (via fax)  
Law Pro, Attn: Claims Reporting Department (via fax)

B/F July 21, 2003

[TOR\_LAW539521711]

**M144033**

Exhibit 2

**Niederluecke, Kurt**

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**From:** Gregory L. Maag [gmaag@conleyrose.com]  
**Sent:** Thursday, January 17, 2008 12:03 PM  
**To:** Niederluecke, Kurt  
**Cc:** Max L. Tribble; Justin A. Nelson; Otis Carroll ; Franklin Jones Jr.; Calvin Capshaw ; rmparker@pbatyler.com; Nanci Mohr; efindlay@rameyflock.com; stefan.stein@hklaw.com; Morris, Scott; Tyler, Craig; Dietzel, Brian; Huff, Michael R.; Graham, Matthew; Tduston@marshallip.com; Nanci Mohr  
**Subject:** RE: MASS v. Ergotron et al.

**All - Pursuant to the protective order, we are snapping back 3 copies of a document. The bates numbers are:**

**M144032-33**

**M144036-37**

**M144038-39.**

**A redacted copy will be sent shortly.**

**Greg Maag**

1/23/2008

Exhibit 3

**GOWLINGS**

Incorporating the practice of SMITH LYONS

**COPY**

July 4, 2003

Mirek Waraksa  
50 Rosehill Avenue  
Toronto, Ontario  
M4T 1G6

Dear Mr. Waraksa:

**Re: Professional Negligence Action**

We are the solicitors for Jerry Moscovitch, Mass Inc. and C Engineered Design Inc.

I write to put you on notice of a claim by my clients arising out of US patent 5,687,939 for a dual screen display (the '939 Patent). You were retained by the inventor, Mr. Jerry Moscovitch, to seek and obtain patent rights with respect to the invention. In particular, you were instructed to seek the broadest possible patent, including one which covered booking.

**REDACTED**

Your failure to follow instructions in this regard, and your failure to act diligently and professionally in carrying out your duties has resulted in damages to my client. In particular, competitors have adopted this design and have profited from its use.

As a result of the above-noted negligence, my client has suffered considerable damages. Accordingly, I would suggest that you bring this matter to your insurer(s) attention, and have them contact us in order to obtain particulars with respect to this matter.

I look forward to hearing from your insurer(s) and/or you with respect to this matter.

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Laura C. Young  
Direct (416) 862-4412  
Direct Fax (416) 863-3622  
Assistant (416) 862-4611  
laura.young@gowlings.com  
File T939961

M144032

Gowling Lafleur Henderson LLP | Barristers & Solicitors | Patent & Trade Mark Agents |

Page 2

Yours very truly,  
**GOWLING LAFLEUR HENDERSON LLP**

Laura C. Young  
LCY:md

cc: ✓ Jerry Moscovitch (via fax)  
Law Pro, Attn: Claims Reporting Department (via fax)

B/F July 21, 2003

[TOR\_LAW5395217/1]

M144033

**Exhibit 4**

Mirek A. Waraksa, B.A.Sc., LL.B.

Patent and Trade Mark Agent

50 Rosehill Ave.  
Suite 1411  
Toronto, Ontario, Canada  
M4T 1G5

(416) 964-7813

August 12, 2003

Laura C. Young  
Gowlings  
Suite 4900  
Commerce Court West  
Toronto, Ontario  
MSL 1J3

Re: Jerry Moscovitch et al

Dear Ms. Young:

I acknowledge your letter dated July 4, 2003.

I have no insurance that covers the alleged negligence. Kindly direct all correspondence to me as I will be handling this matter personally.

I delivered my original files respecting Mr. Moscovitch invention to his then counsel George Rolston. I believe they were urgently needed to prepare a U.S. reissue application. At the time I obtained an undertaking that the files be made available to me in the event of a dispute or law suit. I trust that Mr. Moscovitch will comply with that undertaking, and I ask that you provide me access so I may make copies.

REDACTED

made to the U.S. patent office, Mr. Moscovitch was not a novice inventor with little patenting experience, and he knew precisely what invention he wanted to protect at filing. There was no error.

I prosecuted that application to allowance and close of prosecution on the merits.

REDACTED

M143958

- 2 -

REDACTED

I fail to see how I can be responsible for Mr. Moscovitch's perceived losses to competitive sales. He retained U.S. patent attorneys to reissue his U.S. patent and obtain protection for the booking concept. It appears that his attorneys were unable to obtain patent protection broad enough to cover his competitors' products, consistent with the opinion I gave Mr. Moscovitch earlier. If you care to provide a copy of his U.S. file wrapper, I will be glad to look further into the issue.

I will await your reply.

Yours truly,

A handwritten signature in cursive script, appearing to read "M. Waraksa".

Mirek A. Waraksa

M143959

Exhibit 5

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

MASS ENGINEERED DESIGN, INC.\*  
and\*  
JERRY MOSCOVITCH,\*  
\*  
Plaintiffs,\*  
Counter-Defendants,\*  
\*  
v.\* CASE NO.: 2:06-CV-272 (LED)  
\*  
ERGOTRON, INC.,\*  
CDW CORPORATION, TECH DATA\*  
CORPORATION, and DELL, INC.\*  
\*  
Defendants,\*  
Counterclaimants,\*  
\*  
and\*  
\*  
DELL MARKETING, L.P.\*  
\*  
Intervenor-Defendant\*  
and Counterclaimant.\*

\*\*\*\*\*  
THE ORAL VIDEOTAPED  
DEPOSITION OF  
ALLAN TAMESHTIT  
JANUARY 18, 2008  
\*\*\*\*\*

REPORTED BY: DEBBIE BOOTHE

JOB NO. 67899

Sunbelt Reporting & Litigation Services

Houston Austin Corpus Christi Dallas/Fort Worth East Texas San Antonio  
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1 three copies of the same document here, but let's focus  
2 on the first two pages, M144032 to 033.

3 A. The other copies are identical, is that what  
4 you're saying?

5 Q. I believe so for the purposes of this. In  
6 fact, why don't we do this, since I think all three are  
7 together why don't we just take the first two pages and  
8 separate them so we'll just have one document. So we  
9 have Exhibit 28, which is M144032 to 033; correct?

10 A. Yes.

11 Q. And this is a letter from Ms. Laura Young to  
12 Mr. Mirek Waraksa; correct?

13 A. Correct.

14 Q. And it's dated July 4, 2003?

15 A. Yes.

16 Q. And Ms. Young explains that she is the  
17 solicitor for Mass and Jerry Moscovitch; correct?

18 A. Yes.

19 Q. And a solicitor is one of the Canadian terms  
20 for what we describe as attorneys down here; correct?

21 A. Solicitor, barrister, yeah. I'll say yes.

22 Q. So she is Mass' attorney?

23 A. It -- I mean, she says "We are the solicitors."  
24 I assume that means that she's referring to herself and  
25 not maybe Gowlings, but --

1 Q. She's basically saying that Gowlings is  
2 representing Jerry Moscovitch and Mass; correct?

3 A. I think that sounds right.

4 Q. And this letter is in regard to  
5 Mr. Moscovitch's conduct in prosecuting the '939 patent  
6 application; correct?

7 MR. SCHLATHER: Object to form.

8 A. Mr. Waraksa's conduct you said?

9 Q. (BY MR. NIEDERLUECKE) Yes.

10 MR. SCHLATHER: Object to form.

11 Can you read back the question?

12 THE REPORTER: "And this letter is in  
13 regard to Mr. Moscovitch's conduct in prosecuting the  
14 '939 patent application; correct?"

15 A. So you better correct that. She just said  
16 Mr. Moscovitch's conduct. Is that what you meant?

17 Q. (BY MR. NIEDERLUECKE) Oh, no. Thank you. I  
18 should listen when it's read back.

19 This letter from Ms. Young to Mr. Waraksa  
20 involved Mr. Waraksa's conduct in prosecuting the '939  
21 patent; correct?

22 MR. SCHLATHER: Object to form.

23 A. I'd say that's true.

24 Q. (BY MR. NIEDERLUECKE) And, in fact, she is  
25 putting Mr. Waraksa on notice of a claim by Mass arising

1 out of that U.S. Patent Number '939?

2 A. Correct.

3 MR. SCHLATHER: Object to form.

4 Q. (BY MR. NIEDERLUECKE) And she copied Jerry  
5 Moscovitch on this letter; correct?

6 A. Yes, she did.

7 Q. And she copied an entity named Law Pro;  
8 correct?

9 A. Yes.

10 Q. What is Law Pro?

11 A. I don't know.

12 Q. Do you know if it's an insurance company?

13 A. I don't know.

14 Q. What legal advice was Ms. Young seeking from  
15 Mr. Waraksa?

16 MR. SCHLATHER: Object to form.

17 A. In other words -- well, maybe I'll ask you to  
18 restate that question.

19 Q. (BY MR. NIEDERLUECKE) Was Ms. -- well, first of  
20 all, on July 4th of 2003 Mr. Waraksa no longer  
21 represented Mass, did he?

22 A. I can't say for certain that there weren't any  
23 lingering patents besides the one at hand that Waraksa  
24 was not responsible for, but I doubt that on 2003 -- in  
25 2003 that he would have represented Jerry at that time.

1 I'm not 100 percent certain about that.

2 Q. And this letter -- in this letter Ms. Young is  
3 not seeking Mr. Waraksa's legal counsel, is she?

4 MR. SCHLATHER: Object to form.

5 A. Well, let's look at what this letters requests  
6 from Mr. Waraksa. By way of kind of an instruction to  
7 Mr. Waraksa, it seems that Ms. Young is requesting that  
8 Mr. Waraksa bring this matter to his insurer's attention  
9 and have the insurer contact us in order to obtain  
10 particulars with respect to this matter.

11 Q. (BY MR. NIEDERLUECKE) In fact, Mass is looking  
12 for Waraksa or his insurance company to pay damages  
13 based on his conduct in the prosecution; correct?

14 MR. SCHLATHER: Object to form.

15 A. Again, on the face of this letter, it's exactly  
16 what I said that Ms. Young is requesting from Waraksa.  
17 I think that's speculation to suggest anything else.  
18 She's, as I said, looking to Mr. Waraksa to bring this  
19 matter to his insurer's attention and to have them  
20 contact Gowlings.

21 Q. (BY MR. NIEDERLUECKE) And she's put him on  
22 notice of a claim by Mass against him; correct?

23 MR. SCHLATHER: Object to form.

24 A. Arising out of that '939 patent, yes.

25 Q. (BY MR. NIEDERLUECKE) Do you know what

1 information has been redacted from this document?

2 MR. SCHLATHER: I object on the grounds of  
3 privilege, instruct the witness --

4 MR. NIEDERLUECKE: It's a yes --

5 MR. SCHLATHER: -- not to answer.

6 MR. NIEDERLUECKE: -- or no question at  
7 this point.

8 MR. SCHLATHER: If you can answer the  
9 question -- you can answer the question yes or no.

10 A. I'm not certain if I, as I sit here today, know  
11 what that redacted portion is.

12 Q. (BY MR. NIEDERLUECKE) Had you -- have you seen  
13 this document before in unredacted form?

14 A. I believe I have, yes.

15 Q. Just before the redaction there's a statement  
16 that says "In particular, you were instructed to seek  
17 the broadest possible patent, including one which  
18 covered booking." Do you see that?

19 A. Yes.

20 Q. And then there's a redacted portion; correct?

21 A. Yes.

22 Q. And then the statement is "Your failure to  
23 follow instructions in this regard and your failure to  
24 act diligently and professionally in carrying out your  
25 duties has resulted in damages to my client"; correct?

1 A. Yes.

2 Q. So is it Mass' position that Mr. Waraksa was  
3 instructed to seek a patent that included booking?

4 MR. SCHLATHER: Object to form.

5 A. During the '939 prosecution?

6 Q. (BY MR. NIEDERLUECKE) Yes.

7 A. Yes, Jerry was very much interested in  
8 obtaining booking protection.

9 Q. And that was his instruction to Mr. Waraksa?

10 A. Yes.

11 Q. And that instruction didn't change when  
12 Mr. Waraksa provided his opinion as to the limitations  
13 on the breadth of what he thought could be patented?

14 MR. SCHLATHER: Object to form.

15 A. The testimony shows that Jerry was adamant  
16 throughout the prosecution to include the booking  
17 concept.

18 Q. (BY MR. NIEDERLUECKE) Did Mr. Moscovitch ever  
19 review the claims that were filed in this application  
20 before they issued?

21 MR. SCHLATHER: Object to form.

22 A. I would have to read -- may I look at the  
23 declaration in the '939 patent?

24 Q. (BY MR. NIEDERLUECKE) It's Exhibit 6, I  
25 believe.

1 claims that were being filed on his behalf?

2 MR. SCHLATHER: Object to form.

3 A. Again, on April 23, 1996, Jerry states that  
4 he's reviewed and understands the contents of the  
5 claims.

6 Q. (BY MR. NIEDERLUECKE) Can you recall -- can you  
7 tell me -- I'll let your attorney object if he so  
8 chooses -- what information to the best of your  
9 recollection was redacted from this document?

10 MR. SCHLATHER: We're going to object on  
11 the grounds of privilege and instruct the witness not to  
12 answer.

13 MR. NIEDERLUECKE: I expect you would, and  
14 I'll just obviously reserve my right pending the motion  
15 on this to reconvene should the Court have a broad  
16 enough privilege waiver that covers these. I assume on  
17 Exhibit 27 you would have the same objection, instruct  
18 him not to answer documents regarding --

19 MR. SCHLATHER: Yeah. We're going to  
20 instruct him not to -- I mean, to the extent that you're  
21 trying to ask -- that you're asking him to reveal what's  
22 been redacted in these documents, we're going to object  
23 that that's privileged and instruct him not to answer.

24 MR. NIEDERLUECKE: Okay. So these -- and  
25 just so I understand because I don't know that you guys

1 since these were just recently produced -- I assume that  
2 these redactions are attorney-client privilege?

3 MR. SCHLATHER: Yes.

4 Q. (BY MR. NIEDERLUECKE) If you look at Exhibit  
5 27 --

6 A. Yes.

7 Q. -- after the first set of redactions  
8 Mr. Waraksa is responding to Ms. Young in the letter  
9 saying "Despite conflicting representations he," meaning  
10 Moscovitch, "made to the U.S. Patent Office,  
11 Mr. Moscovitch was not a novice inventor with little  
12 patenting experience." Do you see that?

13 A. Yes, I do.

14 Q. Do you -- does Mass know what conflicting  
15 representations Mr. Moscovitch or Mr. Waraksa was  
16 referring to?

17 MR. SCHLATHER: Object to form.

18 A. Offhand, I don't. I would perhaps consult his  
19 declaration to see if there's any mention of such a  
20 phrase. I'm not sure I can pinpoint you to anywhere  
21 where that type of representation appears that was made  
22 to the U.S. Patent Office according to this document.

23 Q. (BY MR. NIEDERLUECKE) So you're saying at this  
24 time you're not aware what conflicting representations  
25 Mr. Moscovitch was accused of being -- of having made to